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JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1958

No. ~~2~~ 3

FRANCISCO ROMERO,

Petitioner,

—against—

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA
TRASATLANTICA, also known as SPANISH LINE and
GARCIA & DIAZ, INC., and QUIN-LUMBER CO., INC.,

Respondents.

**BRIEF OF RESPONDENT GARCIA & DIAZ, INC.
ON THE MERITS**

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No. 322

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Petitioner,

—against—

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TRASATLANTICA, also known as SPANISH LINE and
GARCIA & DIAZ, INC., and QUIN LUMBER CO., INC.,**

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ON THE MERITS**

Statement of the Case

In the amended complaint it is alleged that at the time of petitioner's injury respondent Garcia & Diaz, Inc. owned, operated, managed and controlled the S. S. "Guadalupe," the vessel on which petitioner was injured (R. 198a):

"SIXTH: That upon information and belief, at all times hereinafter mentioned, the defendant GARCIA & DIAZ, INC., owned, operated and controlled and managed a certain vessel known as the S. S. GUADALUPE, a vessel of Spanish registry, flying the Spanish flag."

In the amended complaint it is also alleged that petitioner at the time of his injury was employed by respondent Garcia & Diaz, Inc. aboard the "*Guadalupe*" as a seaman (R. 198a):

"SEVENTH: That the plaintiff was employed by the defendants, COMPANIA TRASATLANTICA and GARCIA & DIAZ, INC. on board said vessel, the S. S. GUADALUPE, in the capacity of Able Seaman, at an agreed monthly rate of wages."

At the pre-trial hearing all these allegations were withdrawn by petitioner's counsel except the allegation that respondent Garcia & Diaz, Inc. operated, managed and controlled the vessel at the time of petitioner's injury (R. 4a-R. 5a). The respondent Compania Trasatlantica had admitted in its pleadings that it was the employer of petitioner and owner of the vessel and that it managed, operated and controlled the vessel at the time of petitioner's injury (R. 198a, R. 211a-R. 212a). Despite this petitioner insisted that Garcia & Diaz, also was in operation and control of the vessel (R. 5a). Counsel for petitioner advised the Court he was ready with his proof on this question of operation, control and management by Garcia & Diaz, Inc. and the Court directed a hearing on this question (R. 5a):

"The Court: Are you prepared with proof on that?"

Mr. Puente: Yes, your Honor."

Counsel for petitioner then put in evidence the deposition of the Treasurer of Garcia & Diaz, Inc. previously taken (R. 7a-R. 8a, A. 1a-17a) and the agency agreement between Compania Trasatlantica

and Garcia & Diaz, Inc. (R. 182a, A. 40a-51a). The Treasurer of Garcia & Diaz, Inc. was also examined as a witness on the hearing by petitioner (R. 174a-R. 186a) as well as respondent's representative at the pier at the time of the accident (R. 82a, R. 85a). Counsel for petitioner stated to the Court that the foregoing constituted all the proof he had on the question of operation, control and management of the vessel by Garcia & Diaz, Inc. (R. 86a):

"The Court: Now am I to understand that his testimony as now on the record, coupled with the deposition of William Martinez, or, technically, it is the deposition of Garcia & Diaz, Inc., through William Martinez, constitutes all the proof that you propose to offer on the question of management, operation and control of the Guadalupe on May 12, 1954 by Garcia & Diaz? I want an answer, not a shaking of your head.

Mr. Puente: I am sorry, your Honor. Yes. I have two lawyers here.

Mr. Axtell: There is nothing more to offer."

There was not the slightest suggestion of operation, control, or management by Garcia & Diaz, Inc. in any of this proof offered by petitioner and the District Court in so finding, stated (R. 248a-R. 249a, R. 252a):

"* * * On the basis of the deposition of defendant Garcia, through its treasurer, William Martinez, taken by plaintiff on June 10, 1954, and the contract between defendants Garcia and Compania, it is manifest that defendant Garcia was no more to the vessel than a husbanding agent acting in every respect for its principal, defendant Compania. It appears without contradiction that neither Garcia nor any stockholder thereof

owns any stock in Compania, nor is any director of Garcia a director of Compania; nor does Garcia exercise any control over Compania. It further appears that the relationship between Garcia and Compania originated in 1935 when a partnership, the predecessor of Garcia, commenced representing Compania in this port. That partnership was succeeded by the present corporate defendant, Garcia, and pursuant to a contract made in 1948 between Garcia and Compania, the former has since that time husbanded the latter's vessels in this port. It further appears that defendant Garcia represents as many as ten other Spanish and Cuban ship owners in this port, none of whom is a subsidiary of defendant Compania. It further appears that defendant Garcia did not contribute financially to the purchase or construction of the S. S. Guadalupe. As such agent, defendant Garcia pays the pilot and docking charges and the charges for water and supplies for the vessels of defendant Compania, but all for the account of the defendant Compania. For this service defendant Garcia receives from the defendant Compania commissions, based upon the incoming and outgoing freight and passenger traffic. There was no proof adduced at the pre-trial hearing of management, operation and control by Garcia except as it might arise by virtue of the agency agreement. Nor did plaintiff offer any proof of any negligent act by defendant Garcia within the scope of the agency, contributing to his injury.

In the light of the finding above that the defendant Garcia was solely an agent for the husbanding of the S. S. Guadalupe, plaintiff's Jones Act claim against this defendant must also be dismissed."

ARGUMENT

The action of the District Court in dismissing the complaint as against respondent Garcia & Diaz, Inc. was fully justified by the decisions of this Court in:

Cosmopolitan Shipping Co. v. McAllister, 337

U. S. 783, decided June 27, 1949;

Caldarola v. Thor Eckert & Co., 332 U. S. 155.

Further clear authority for the District Courts action is to be found in the case of:

Buro v. American Petroleum Transport Corporation, et al., 75 F. Supp. 371, aff'd. 168 F.

2d 924, cert. den. 335 U. S. 861 (1948).

In the *Cosmopolitan* case, *supra*, this Court stated (pp. 800-801):

"Thus the cases and an analysis of the relations established by the standard form agreement lead to the conclusion that an agent such as Cosmopolitan, who contracts to manage certain shore-side business of a vessel operated by the War Shipping Administration, is not liable to a seaman for injury caused by the negligence of the master or crew of such a vessel."

In the *Buro* case, *supra*, the Court of Appeals, Second Circuit, said (pp. 926-927) :

"The plaintiffs argue, however, that where the general agent is in fact in possession and control of the vessel, it is liable for negligence resulting from its conduct. They say, further, that in such a situation the agency contract with the Government will not relieve it of responsibility for its torts. We need not consider the validity of this assumption, for the plaintiffs have failed to make any showing of such control and possession on the part of the defendants. The evidence relied on by McGowan no more than demonstrates that the defendant's acts were consistent with the contractual provisions entered into with the Government, while in the *Buro* case, the defendant's affidavit that it managed the 'William Penn' 'in accordance with the terms of the aforementioned General Agency Agreement, and not otherwise,' was not denied. It is settled that the general agency agreement does not make the agent the owner pro hac vice of the vessel so as to impose liability on the agent for injuries such as we have here. It would be an absurdity in such circumstances to impose liability on the agent where its acts have been in accordance with the provisions of the agreement and consistent therewith. That is the situation we have here."

It is to be noted that the *Buro* case was decided on a motion for summary judgment before trial (75 F. Supp. 371). The proof of the plaintiff in that case failed to show any evidence of operation, control or management by the agent and failed to evidence any neglect on the agent's part contributing to the plain-

tiff's injury. There was no basis whatever for continuing the suit against the defendant and the motion for judgment had to be granted.

Similarly here there was no showing of operation, control or management by respondent or of any neglect on its part contributing to petitioner's injury. The District Court, accordingly, was correct in dismissing the complaint against respondent Garcia & Diaz, Inc. The District Court did no more than it would have been required to do at the close of the plaintiff's case had the action been actually on trial.

CONCLUSION

The judgments of the United States Court of Appeals for the Second Circuit and of the District Court for the Southern District of New York should be affirmed.

Respectfully submitted,

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